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No. 04-1264

IN THE
SUPREME COURT OF THE UNITED STATES

BUCKEYE CHECK CASHING, INC.,

Petitioner,

v.

JOHN A. CARDEGNA AND DONNA REUTER,

Respondents.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENTS

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CASES

Beacham v. Carr, 166 So. 456 (Fla. 1936) 4

Chandler v. Kendrick, 146 So. 551 (Fla. 1933) 4, 16

Jersey Palm-Gross, Inc. v. Paper,
658 So. 2d 531 (Fla. 1995) 16

Johnson v. The Cash Store, 68 P.3d 1099
(Wash. Ct. App. 2003) 9

Prima Paint Corp. v. Flood & Conklin Mfg. Corp.,
388 U.S. 395 (1967) 3

Stubblefield v. Dunlap, 4 So. 2d 519 (Fla. 1941) 16

Turner v. E-Z Check Cashing,
35 F. Supp. 2d 1042 (M.D. Tenn. 1999) 9, 11

STATUTES

S.A. 1523, 151 Cong. Rec. S8836, S8866, 2005
WL 1719568 (2005) 5

The Service Members Anti-Predatory Lending Protection
Act, H.R. 97, 109th Cong. (2005) 5

Deferred Presentment Act
§§ 560.401-408, Fla. Stat. (2002) 16
§ 560.404(18) 9
§ 560.408 16

REGULATORY MATERIAL

*Comptroller Gerald Lewis Money Transmitter Task
Force Final Report* (Nov. 1994) 14, 15

Comptroller Gerald Lewis Money Transmitter Task Force Meeting, Sept. 2, 1993 15

Comptroller Gerald Lewis Money Transmitter Task Force Meeting, Oct. 5, 1993 16

Douglas E. Ebert, Chairman Comptroller Gerald Lewis Money Transmitter Task Force, Letter to The Hon. Gerald Lewis, Comptroller of Florida (Nov. 1994) 14

MISCELLANEOUS

Joe B. Birkhead, *Collection Tactics of Illegal Lenders*, 8 Law & Contemp. Probs. 78 (1941) 10

John R. Burton, et al., *The Alternative Financial Sector: Policy Implications for Poor Households*, 42 Consumer Interests Annual 279 (1996) 5

John P. Caskey, *Fringe Banking: Check Cashing Outlets, Pawn Shops, and the Poor* (1994) 10

Patricia Cirillo, Cypress Research Group, *Payday Advance Customer Satisfaction Survey*, May 2004 7

Community Fin. Servs. Ass'n of Am., Br. as *Amicus Curiae* Supporting Petitioner, *Buckeye Check Cashing, Inc. v. Cardegna*, No. 04-1264, (U.S. Aug. 12, 2005), 2005 WL 1941281 7

Lynn Drysdale & Kathleen Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. Rev. 589 (2000) ..... *passim*

Ronald A. Duchin, *Predatory lenders stalk our troops*, Wash. Times, June 28, 2005, at A14, *available at* www.washingtontimes.com/commentary/20050627-090226-9305r.htm 6

Gregory Elliehausen & Edward Lawrence, Georgetown Univ. Credit Research Center, *Payday Advance Credit in America: An Analysis of Customer Demand,* Apr. 2001, *available at* www.msb.edu/prog/crc/order/mono35.pdf 7

Keith Ernst, et al., Center for Responsible Lending, *Quantifying the Economic Cost of Predatory Payday Lending* (2004), *available at* www.responsiblelending.org/pdfs/CRLpaydaylendingstudy121803.pdf 12

Jean Ann Fox, Consumer Fed'n of Am., *Unsafe and Unsound: Payday Lenders Hide Behind FDIC Bank Charters to Peddle Usury* (2004) 11

Jean Ann Fox & Anna Petrini, Consumer Fed'n of Am., *Internet Payday Lending: How High-priced Lenders Use the Internet to Mire Borrowers in Debt and Evade State Consumer Protections* (2004), *available at* www.consumerfed.org/internet_payday_lending113004.pdf 13

George L. Gisler, *Organization of Public Opinion for Effective Measures Against Loan Sharks*, 8 Law & Contemp. Probs. 182 (1941) 10

Sharon Hermanson & George Gaberlavage, AARP, *The Alternative Financial Services Industry* (2001) 2

Frank B. Hubachek, *Annotations on Small Loans: Based on the Sixth Draft of the Uniform Small Loan Law* (1938) 10

Ill. Dep't of Fin. Insts., *Short Term Lending Final Report* (1999) 12

Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?* 87 Minn. L. Rev. 1 (2002) ... 8

Terri Lukach, *DoD Cautions Servicemembers Against 'Loan-Shark' Lenders*, Am. Forces Info. Serv., June 17, 2005, http://www.defenselink.mil/news/jun2005/20050617_1762.html 7

Lisa B. Moss, *Modern Day Loan Sharking: Deferred Presentment Transactions & The Need For Regulation*, 51 Ala. L. Rev. 1725 (2000) 13

Nat'l Consumer Law Center, 18 *NCLC Reports: Consumer Credit and Usury Ed.* (2000) 11

Rolf Nugent, *The Loan-Shark Problem*, 8 Law & Contemp. Probs. 3 (1941) 9

Elizabeth Renuart, AARP, *Payday Loans: A Model State Law* (2000) 2

John Ruoff, South Carolina Fair Share, *The Credit Research Center Study of Payday Loan Customers*, June 2005 8

John Ruoff, South Carolina Fair Share, *The Cypress Research Group Study of Payday Loan Customers*, July 2005 7

Scott A. Schaaf, *From Checks to Cash: The Regulation of the Payday Lending Industry*, 5 N.C. Banking Inst. 339 (2001) 13

William H. Simpson, *Cost of Loans to Borrowers Under Unregulated Lending*, 8 Law & Contemp. Probs. 73 (1941) 10

Michael A. Stegman & Robert Faris, *Payday Lending: A Business Model that Encourages Chronic Borrowing*, 17 Econ. Dev. Q. 8 (2003) 12

Stephens, Inc., *Undiscovered Companies Serving Underbanked and Unwanted Consumers*, The 3U Consumer Fin. Monthly (Mar. 29, 2004) 13

Roger Swagler, et al., *The Alternative Financial Sector: An Overview*, 7 Advancing the Consumer Interest 7 (Fall 1995) 5

U.S. Pub. Interest Research Group & Consumer Fed'n of Am., *Show Me the Money! A Survey of Payday Lenders and Review of Payday Lender Lobbying in State Legislatures* (2000), *available at* http://uspirg.org/reports/paydayloans2000/showmethemoneyfinal.pdf 13

Amanda Van Benschoten, *Military Targets -- Scams Aim at Soldiers*, Sunday Challenger, July 24, 2005, at 1A, *available at* http://www.challengernky.com/articles/2005/07/25/around_nky/doc42e14a4b75e75296734289.txt 6

Woodstock Inst., *Unregulated Payday Lending Pulls Vulnerable Consumers Into Spiraling Debt*, Reinvestment Alert, Mar. 2000 8

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BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

AARP is a non-partisan, non-profit organization with more than 35 million members dedicated to addressing the needs and interests of people 50 and older. As the largest membership organization serving this population, AARP is greatly concerned about unfair and deceptive financial products and services targeted at vulnerable consumers, including those involving a range of credit transactions. Because older Americans are disproportionately victimized by many of these practices, AARP advocates for the enactment and enforcement

[1] Letters indicating the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its counsel, or its members made a monetary contribution to the preparation or submission of this brief.

of federal and state laws and regulations that protect consumers from exploitation in the credit marketplace.

AARP also supports laws and public policies designed to preserve the legal means for consumers to seek redress when they are harmed by fraudulent, deceptive, or unfair practices. To help achieve this, AARP advocates for improved access to the civil justice system and supports the availability of the full range of enforcement tools. AARP thus is concerned that access to the justice system for consumers has been severely curtailed by the growing number and range of corporations that impose binding arbitration as a condition of doing business. AARP has filed *amicus curiae* briefs in this Court and in federal and state courts around the country addressing the importance of preserving court access for consumers and ensuring that they can seek the full range of redress that Congress and state legislatures enacted for their benefit.

These issues are of particular concern for low-income consumers, those whom mainstream lenders consider "high risk" borrowers, and consumers on fixed incomes who often have difficulty finding credit on reasonable terms. They typically are relegated to high-cost lenders and non-traditional sources of credit where they often are subjected to deceptive and unfair lending practices. AARP has published several reports on the issues involved and measures needed to protect consumers from these lenders' most egregious practices. *See, e.g.*, Sharon Hermanson & George Gaberlavage, AARP, *The Alternative Financial Services Industry* (2001), and Elizabeth Renuart, AARP, *Payday Loans: A Model State Law* (2000). AARP also has assisted in state legislative efforts to enact protections for consumers involved in these transactions, and has filed *amicus curiae* briefs urging courts, including the Florida Supreme Court in this case, to uphold these protections, especially in the face of lenders' claims they do not make loans and their other ruses to avoid compliance with interest limits and other statutes.

AARP believes the Florida Supreme Court was correct in ruling that a court, not an arbitrator, should decide whether a contract containing an arbitration provision is illegal, and

therefore void, under state law. To allow otherwise effectively puts the cart before the horse, giving an arbitrator authority to make a ruling about a contract that, if found void, could not have conferred any authority on the arbitrator. This Court's ruling in *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395 (1967), does not direct a different outcome, and the federal Circuit Courts that have held otherwise have failed to properly consider the difference between void and voidable contracts. Those courts also have created an untenable distinction between situations in which a contract was not formed because the parties have not mutually assented to terms, and situations involving void transactions in which a legal contract was never formed.

AARP believes Respondents will thoroughly brief those issues, and accordingly submits this brief to assist the Court by discussing key loan products in the "fringe banking" market and the harm to Florida's and other states' vulnerable borrowers if these lenders can use contracts that are *illegal*, and void, under state law to evade compliance with state usury limits and, at the same time, preclude borrowers from challenging their unlawful practices in court.

SUMMARY OF ARGUMENT

Low-income consumers and those whom mainstream lenders consider "high risk" often cannot find credit in the traditional market and rely on high-cost lenders and non-traditional sources of credit, collectively referred to as the "fringe banking" industry or "alternative financial sector" (AFS). Payday loans, refund anticipation loans (RALs), and automobile title pawns are the most common products offered in this market, typically at triple digit and higher annual percentage rates (APRs). The fringe banking industry targets low-income and working poor consumers, minorities, enlisted military personnel and those with blemished credit histories -- consumers most vulnerable to exploitation and least able to protect their interests. This has resulted in a two-tiered economy, often referred to as a system of "financial apartheid" or a "second-class" market, in which middle-income and affluent consumers are served by federally-insured and

regulated banks and other lenders, and the poor and near-poor are relegated to expensive and, in many cases, poorly regulated alternatives. *See* Lynn Drysdale & Kathleen Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. Rev. 589, 591 (2000) [hereinafter *Two-Tiered Marketplace*].

These consumers often have little choice but to turn to these lenders due to their limited bargaining power and financial desperation, and are among those with the greatest need for a market that operates with integrity and the enforcement of usury and other laws enacted for their especial benefit. The Florida legislature saw fit to protect these necessitous borrowers from predation by enacting Chapter 687 of the Florida Statutes, which criminalizes loans made at rates that exceed 25% per annum, and provides misdemeanor or felony sanctions depending on how much the rate exceeds that limit. In order to evade statutes such as this one, fringe lenders historically have characterized their products in various guises; Petitioner, for example, maintained it was not making loans but merely was charging a fee for a check cashing service. Florida courts have a long history of recognizing the role of usury laws to protect borrowers, as well as looking at the substance of a transaction to determine if it is designed to evade usury laws. *See, e.g., Chandler v. Kendrick*, 146 So. 551, 552 (Fla. 1933) (purpose of usury laws is to "bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans."); *Beacham v. Carr*, 166 So. 456, 459 (Fla. 1936) (to frustrate such evasions "'courts have been compelled to look beyond the form of a transaction to its substance, and they have laid it down as an inflexible rule that mere form is immaterial, but that it is the substance which must be considered.'") (citation omitted).

The Court should affirm the Florida Supreme Court's ruling in order to effectuate the statutory scheme enacted by the state legislature to protect vulnerable borrowers from overreaching by lenders. To do otherwise will allow businesses to continue to enforce void, illegal contracts and to prevent courts from scrutinizing their actions.

ARGUMENT

I. STATE LAWS MUST PROTECT VULNERABLE CONSUMERS EXPLOITED BY FRINGE LENDERS.

A. The Nature of the Marketplace.

In order for the Court to fully appreciate the implications of its decision, it is important to understand the nature of the market in which payday loans are made. These loans are part of an industry popularly referred to as "fringe banking" or the "alternative financial sector" (AFS). *See* Roger Swagler, et al., *The Alternative Financial Sector: An Overview*, 7 Advancing the Consumer Interest 7, 7 (Fall 1995); John R. Burton, et al., *The Alternative Financial Sector: Policy Implications for Poor Households*, 42 Consumer Interests Annual 279, 279 (1996). Fringe bankers target low-income, working poor, and minority consumers, and those with blemished credit histories, who cannot access traditional sources of money, credit, or certain consumer goods. While many consumers have other ways to obtain short-term, unsecured loans, such as credit cards and checking accounts with overdraft lines of credit, the poor and near-poor cannot access these sources. Coupled with the decline in the availability of small, unsecured loans from banks and finance companies, many consumers with modest incomes or impaired credit find fringe bankers their only source of credit.

During the last year or so, the government has focused increased attention on fringe bankers as they have targeted a fertile new market of vulnerable consumers – the nation's military personnel. For example, The Service Members Anti-Predatory Lending Protection Act, H.R. 97, 109th Cong. (2005), would cap APRs at 36% and place new limits on loan renewals and disclosures. Senators Dole, Durbin, and Nelson have introduced SA 1523 which would amend S.1042, a bill to authorize appropriations for fiscal year 2006 for military activities of the Department of Defense. The amendment addresses consumer credit extended to service members and their dependents and would, among other things, impose the same cap. 151 Cong. Rec. S8836, S8866, 2005 WL 1719568 (2005). A recent newspaper commentary highlighted the

problem: "military bases are under siege by an army of financial predators known as 'payday lenders.' . . . Military towns are the favorite hunting grounds of the payday lenders for one very good reason -- these lenders have become rich by victimizing service people and their families with short-term loans at usurious interest rates." Ronald A. Duchin, *Predatory lenders stalk our troops*, Wash. Times, June 28, 2005, at A14, *available at* www.washingtontimes.com/commentary/20050627-090226-9305r.htm. As seen in other situations,

> [e]ven in states where payday lending is illegal it often flourishes anyway with lenders thinly disguising their operations or just simply ignoring the law. With our servicemen and -women putting their lives on the line for America in two war zones, it's way past time that America counterattacks to protect servicepeople from this kind of financial abuse at home. . . . Service people are by no means the only victims of payday lenders, but they are an easy target, especially in wartime. The disruption of overseas deployment causes financial stress for families. . . . With bills mounting for the folks at home, there's the constant temptation to raise some quick cash through a payday lender.

Id.

Describing the typical payday transaction, the commentary draws an analogy to "criminal loan sharking rings" that hook victims with short-term loans at usurious interest rates, "and when the victim can't pay, keep bleeding him or her with mounting interest charges and expanded loans. The shocking difference between loan sharks and payday lenders is that the loan sharks' typical annual 250 percent interest is considerably less than what payday lenders collect." *Id.*; *see also* Amanda Van Benschoten, *Military Targets -- Scams Aim at Soldiers*, Sunday Challenger, July 24, 2005, at 1A, *available at* http://www.challengernky.com/articles/2005/07/25/around_nky/doc42e14a4b75e75296734289.txt (describing state legislation that would restrict high payday lending rates and overpriced life insurance and noting that Kentucky State

Treasurer Jonathan Miller described members of the military as "'sitting ducks' for people hoping to make a quick buck from their steady income and financial naivete," and stated that the "'bad guys' [have] picked these military families, because a lot of them are distracted by the war, and they're very young . . . and [t]hey've become an all-too-common victim.'"); Terri Lukach, *DoD Cautions Servicemembers Against 'Loan-Shark' Lenders*, Am. Forces Info. Serv., June 17, 2005, http://www.defenselink.mil/news/jun2005/20050617_1762.html (according to John Molino, deputy undersecretary of defense for military community and family policy, payday loans are the most prevalent type of loan-shark lending affecting military families; Molino noted that payday lenders set up their businesses "'right outside the gate'" of military installations and that the high use of payday loans makes the "potential for detrimental impact on mission accomplishment . . . very real. 'The effects are long-lasting and go deep into a person's performance; it affects unit readiness.'").

Well aware that they are one of the few sources of cash for these consumers, fringe lenders maintain they merely are filling the gap created by traditional lenders. *See, e.g.*, Br. for Community Fin. Servs. Ass'n of Am. as *Amicus Curiae* Supporting Petitioner at *5-6, *Buckeye Check Cashing, Inc. v. Cardegna*, No. 04-1264, (U.S. Aug. 12, 2005), 2005 WL 1941281 (stating that studies show "payday advances satisfy an unfulfilled demand for small denomination, short-term credit" and that borrowers find the loans beneficial).[2/] Even if this

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[2/] The cited studies, Gregory Elliehausen & Edward Lawrence, Georgetown Univ. Credit Research Center, *Payday Advance Credit in America: An Analysis of Customer Demand*, Apr. 2001, *available at* www.msb.edu/prog/crc/order/mono35.pdf, and Patricia Cirillo, Cypress Research Group, *Payday Advance Customer Satisfaction Survey*, May 2004, have been criticized as being neither objective nor scientifically sound. The former was supported in part by a grant from *amicus curiae* CFSAA, and the latter was undertaken on behalf of CFSAA. *See* John Ruoff, South Carolina Fair Share, *The Cypress Research Group Study of Payday Loan Customers*, July 2005 (taking issue with study's estimates of borrowers' demographic

(continued...)

were a legitimate argument, and AARP does not concede that it is, the provision of a necessary service neither justifies the practices that harm the very consumers these lenders claim to help nor supports thwarting the legal protections enacted for their benefit. Moreover, no level of customer satisfaction justifies an illegal transaction.

A primary segment of the fringe market offers products that allow consumers to obtain a relatively small amount of cash with repayment deferred for a relatively short period, usually two weeks. The three main forms of these cash advances – payday loans, refund anticipation loans (RALs), and auto title pawns – are extremely expensive, typically imposing triple digit annual percentage rates (APRs), far in excess of state usury limits. Even in states with permissive payday loan laws, the industry seems unable to comply with federal and state laws or even the industry's own "best practices." *See* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 Minn. L. Rev. 1, 26-98 (2002).

In addition to high APRs, fees paid for "roll overs," when the borrower cannot repay the loan and pays another fee to extend the loan period, lead to significantly higher costs that borrowers can ill afford, and to an even greater gap between the cost of these loans and mainstream sources of credit. *See* Woodstock Inst., *Unregulated Payday Lending Pulls Vulnerable Consumers Into Spiraling Debt*, Reinvestment Alert, Mar. 2000, at 4. Moreover, rollovers often result in finance charges that exceed the original amount borrowed, and the borrower still owes the face amount of the check. This

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[2] (...continued)
and socio-economic characteristics and representations regarding satisfaction based on, among other things, shortcomings endemic to telephone surveys and the fact that only 2,000 of the sample of 17,571 customers with at least one loan between Jan. 2, and April, 15, 2004 responded) and John Ruoff, South Carolina Fair Share, *The Credit Research Center Study of Payday Loan Customers*, June 2005 (making similar criticism where only 427 (8%) of sample of 5,365 customers of CFSAA members completed the survey).

problem was illustrated in *Turner v. E-Z Check Cashing*, 35 F. Supp. 2d 1042 (M.D. Tenn. 1999), in which a payday lender advanced $300.00 in return for the borrower's $405.00 check. The borrower could not afford to repay the $405.00 at the end of one month, and ended up paying monthly service charges of $105.00 for the next eight months ($840.00) because she could not repay the original $405.00 debt. *See also Johnson v. The Cash Store*, 68 P.3d 1099 (Wash. Ct. App. 2003) (involving a borrower who wrote a post-dated check for $575.00, received $500.00, and did fifteen rollovers in seven months, each time paying $75.00; she thus paid $1125.00 *in fees alone* for a $500.00 loan). The Florida legislature recognized this problem and, in enacting the Deferred Presentment Act provided that "[n]o deferred presentment provider or its affiliate may engage in the rollover of any deferred presentment agreement." Fla. Stat. § 560.404(18) (2002).

B. The Evolution of Payday Loans Shows Their Abusive Nature.

1. Payday Lenders & Their Antecedents Always Have Used Exploitative Practices

Payday loans have direct precursors in loans made against a borrower's wages. As salaries increased to the point they covered necessities and provided a surplus to pay principal and interest on debts, "prospective salaries and wages became assets, however inchoate, against which loans could be made." Rolf Nugent, *The Loan-Shark Problem*, 8 Law & Contemp. Probs. 3, 4 (1941). The "five-for-six-boys" lent $5.00 at the beginning of the week, to be repaid with $6.00 on the borrower's next payday, one or two weeks later. *See Two-Tiered Marketplace*, *supra*, at 618. In some instances, "salary buyers" would "buy" the borrower's next wage packet at a discount, for example, advancing $22.50 in exchange for the "sale" of a $25.00 paycheck two weeks later (with an APR of 311%). *Id.* at 618-19. Another practice involved having the borrower sign a check covering the loan principal and interest. The check was drawn on a bank in which the borrower did not have an account, and the lender said it would not cash the check

but would hold it as "security" and return it to the borrower when the loan was repaid. If the borrower defaulted, the lender deposited the check and threatened to prosecute the borrower when the bank refused payment. *See* Joe B. Birkhead, *Collection Tactics of Illegal Lenders*, 8 Law & Contemp. Probs. 78, 86 (1941).

These loans were short-term, with two weeks being the most common period. William H. Simpson, *Cost of Loans to Borrowers Under Unregulated Lending*, 8 Law & Contemp. Probs. 73, 73 (1941). While the interest rates on these loans were usurious, borrowers generally did not know their rights or have access to court, resulting in few challenges. "The one who suffers most at the hands of high-rate lenders is the borrower, yet he is almost the only member of society who has done nothing about his plight." *Two-Tiered Marketplace*, *supra*, at 619-20 (citing George L. Gisler, *Organization of Public Opinion for Effective Measures Against Loan Sharks*, 8 Law & Contemp. Probs. 182, 182 (1941)).

Despite the high cost, people in financial distress renewed these small loans, entering a downward spiral mirrored by today's payday borrowers. *Id.* at 620. The borrowers' dire situation led to legislation to regulate the lenders, producing a legal framework that permitted a high enough return to attract legitimate businesses into the small loan market, with sufficient safeguards to prevent the abuses that prevailed among "loan sharks." *Id.* at 621 (citing Frank B. Hubachek, *Annotations on Small Loans: Based on the Sixth Draft of the Uniform Small Loan Law* 1-3 (1938)). Lenders argued that these transactions involved property purchases that were not governed by usury laws, but the Uniform Small Loan Laws adopted by many states between 1916 and 1935 defined them as cash lending, subjecting them to small loan regulation. *See* John P. Caskey, *Fringe Banking: Check Cashing Outlets, Pawn Shops, and the Poor* 31-32 (1994). Every state except Arkansas enacted small loan laws, with Arkansas capping interest in its constitution. *See Two-Tiered Marketplace*, *supra*, at 621.

2. Payday Loans Are Costly and Exacerbate Borrowers' "Debt Trap"

Payday loans typically involve the borrower writing a personal check payable to the lender and receiving cash minus a fee. The borrower and lender both know the borrower does not have sufficient account funds to cover the check, and the lender agrees to hold the check until the borrower's next payday or another designated date. At the end of the initial loan term, usually one or two weeks, the borrower can redeem the check by paying the face amount, allow the check to be cashed, or refinance ("roll over") the loan by paying another fee. Payday loans are marketed as a quick, easy way to obtain cash. Borrowers need only maintain a personal checking account, be employed for a specified period with their current employer, and show a pay stub and bank statement. Payday lenders do not make inquiries routinely made by mainstream lenders, *e.g.*, credit checks, examinations of the borrowers' ability to repay, assessments of the borrowers' debt-income ratio. A key element of these loans is extremely high interest rates and associated costs. A recent report found typical APRs on two-week loans ranging from 390% to 780%, despite much lower state interest caps. Jean Ann Fox, Consumer Fed'n of Am., *Unsafe and Unsound: Payday Lenders Hide Behind FDIC Bank Charters to Peddle Usury* 2 (2004).

Senator Joseph Lieberman hosted a December 1999 payday lending forum and unveiled two charts which show it is virtually impossible for an average family to repay a payday loan when it comes due. One chart showed that a family with a household income of $35,000 and typical deductions (*e.g.*, taxes) and expenses (*e.g.*, food, housing) could not repay a loan as small as $168 at the end of two weeks. *See* Nat'l Consumer Law Center, 18 *NCLC Reports: Consumer Credit and Usury Ed.* 13-14 (2000). This helps illustrate the fiction that lenders intend the loans to be repaid in two weeks; instead, the industry is based upon the knowledge that rollovers will be necessary. As illustrated above, rollovers lead to significantly higher costs that borrowers can ill afford and create a "debt treadmill" that exacerbates the borrower's financial situation. A recent study noted: "[b]ecause of the high fees and very short terms,

borrowers can find themselves owing more than the amount they originally borrowed after just a few rollovers within a single year." Michael A. Stegman & Robert Faris, *Payday Lending: A Business Model that Encourages Chronic Borrowing*, 17 Econ. Dev. Q. 8, 19 (2003) [hereinafter *Chronic Borrowing*]. The authors conclude that "the business practices pursued by many payday loan companies can have the same wealth-depleting effect on financially fragile families as other abusive consumer credit practices." *Id.* at 25.

Similar problems result when lenders, sometimes to circumvent state restrictions such as Florida enacted on rollovers, allow "back-to-back" transactions in which borrowers pay off their first loan but must immediately take out another loan to meet their financial needs until their next payday. *See* Keith Ernst, et al., Center for Responsible Lending, *Quantifying the Economic Cost of Predatory Payday Lending* 3 (2004), *available at* www.responsiblelending.org/pdfs/CRLpayday lendingstudy121803.pdf. "[P]ayday lenders collect the vast majority of their fees from borrowers trapped in a cycle of repeated transactions. . . . This cycle (the 'debt trap') locks borrowers into revolving, high-priced short-term credit instead of meeting the need for reasonably priced, longer-term credit." *Id.* at 2. Moreover, if these loans really were meant to address a temporary need for a small amount of money "one would expect to see industry revenues driven by one-time or other limited-use borrowers. For borrowers taking out five, ten, or even twenty or more loans per year, payday lending functions as chronic debt, instead of helpful credit." *Id.* at 6 (footnotes omitted). *See also Chronic Borrowing*, *supra*, at 25 ("despite its expanding customer base and notwithstanding industry denials, the financial performance of the payday loan industry, at least in North Carolina, is significantly enhanced by the successful conversion of more and more occasional users into chronic borrowers."); Ill. Dep't of Fin. Insts., *Short Term Lending Final Report* 6 (1999) (on file with AARP) ("Customers rarely borrow a single time, in fact, repeat business is the main source of revenue. A single licensee may have a limited customer base, but if the customer regularly refinances a loan the store may be quite profitable.").

There has been an explosive growth in payday lending since the industry emerged in the early 1990s. *See* Scott A. Schaaf, *From Checks to Cash: The Regulation of the Payday Lending Industry*, 5 N.C. Banking Inst. 339, 339 (2001) [hereinafter *From Checks to Cash*]. An Arkansas investment firm recently predicted a base of 22,000 stores generating $6 billion annually *in fees alone*. Stephens, Inc., *Undiscovered Companies Serving Underbanked and Unwanted Consumers*, The 3U Consumer Fin. Monthly 2 (Mar. 29, 2004). It also forecast a growth of 12-18% and annual loan volume of $40 billion. *Id.*

This growth has been tied to the deregulation of the banking industry, the absence of traditional lenders in the small loan, short-term credit market, and the elimination of interest rate caps. *See* Lisa B. Moss, *Modern Day Loan Sharking: Deferred Presentment Transactions & The Need For Regulation*, 51 Ala. L. Rev. 1725, 1732 (2000). Deregulation in the 1980s led banks to eliminate less profitable services, such as free checking and small balance accounts, leaving millions of low-income households with little access to free financial services. *Id.* As mainstream institutions moved out of this market due to higher returns on larger loans, payday lenders filled the void. *Id. See also From Checks to Cash*, *supra*, at 340-41.

In addition to an increase in stand alone payday lenders, the surge in the number of loans also can be attributed to the entry into the market of check cashing outlets, convenience stores, gas stations, and pawn shops, as well as offers on the Internet. *See* U.S. Pub. Interest Research Group & Consumer Fed'n of Am., *Show Me the Money! A Survey of Payday Lenders and Review of Payday Lender Lobbying in State Legislatures* 8 (2000), *available at* http://.uspirg.org/reports/paydayloans2000/showmethemoneyfinal.pdf. *See also* Jean Ann Fox & Anna Petrini, Consumer Fed'n of Am., *Internet Payday Lending: How High-priced Lenders Use the Internet to Mire Borrowers in Debt and Evade State Consumer Protections* (2004), *available at* www.consumerfed.org/internet_payday_lending113004.pdf (surveying 100 Internet sites offering payday loans and finding rapid growth in websites

marketing and/or delivering small loans; also finding lenders often bypass state usury and other laws by operating without state licenses or locating in states without meaningful restrictions and claiming loans are subject to home state's law regardless of protections in borrower's state).

C. Usury Laws Must Be Enforced to Protect Consumers From Fringe Bankers' Exploitative Practices.

Florida consumers and those in other states benefit from strong marketplace protections that enhance their economic security. The growth of the fringe banking, specifically targeting consumers most vulnerable to predatory practices and least able to protect themselves from abuse, warrants stronger regulation and the rejection of exploitative lenders' attempts to evade these protections. Fringe banking customers frequently are at a distinct disadvantage because of limited education, bargaining power, and financial desperation. Vulnerable consumers like these need special protection, a role served by usury laws which have, for centuries, been enforced to "protect the needy from the greedy." *Two-Tiered Marketplace*, *supra*, at 657.

The problems presented by fringe bankers have been acute in Florida and the legislature has acted when it learned of the need to curb abuses despite the usury law. In 1993, the Florida Comptroller created a "Money Transmitter Task Force" to determine "whether the money transmitter industry should be subjected to enhanced government regulation in Florida." Letter from Douglas E. Ebert, Chairman, to The Honorable Gerald Lewis, Comptroller of Florida (Nov. 1994) (accompanying *Comptroller Gerald Lewis Money Transmitter Task Force Final Report*). The Task Force "determined that regulation was necessary and provided the Comptroller with specific statutory and administrative guidelines upon which the industry should be regulated. These recommendations came in the form of proposed legislation" which was enacted in 1994. *Comptroller Gerald Lewis Money Transmitter Task Force Final Report* 3 (Nov. 1994). The law gave the state Division of Banking and Department of Banking and Finance regulatory authority over

the money transmitter industry, defined broadly to include check cashers. *Id.* at 1. The Task Force found a significant increase in the number of check cashers in Florida, noting the "yellow pages listings for check cashers grew by 110 percent . . . between late 1988 and early 1992, at a time when the industry grew by 11 percent in the state of Illinois and 22 percent in the state of New York." *Id.* at 6.

That the Task Force Final Report was silent about payday lending through deferred presentment transactions was not surprising, given representations made by industry representatives during Task Force meetings. For example, a Task Force member who was President of the Florida Check Cashers Association stated payday loans were not a "real problem."

> We as an association have taken a strong stance against it. Don't do it. This is usurous [sic]. . . . You're providing a loan and it's just a bad situation. So we have told people not to do it. If it is a member that is doing it, we boot them out. If we have information we will notify the State Attorney in that area that they are doing that.

Task Force Meeting, Sept. 2, 1993, at 168 (statement of Joseph M. Doyle).

A leading expert on check cashing and payday lending cautioned the Task Force against allowing check cashers to make payday loans:

> If you allow check cashing outlets to make payday loans where they're essentially in the small loan business, that is an area where there has historically been a great deal of abuse, consumer abuse. . . . [T]here is a strong need for consumer protection laws and also in collection policies. So I think the state should reasonably take the choice by saying that's something we want the check cashers to stay out of,

> leave that to the loan industry which is regulated in a different way.

Task Force Meeting, Oct. 5, 1993, at 225 (statement of Professor John P. Caskey). Mr. Doyle responded that his association wholeheartedly agreed with everything the Professor said. "The payday loans, we've talked about in previous meetings. We're totally against that in Florida. Anything we can do to make it an illegal activity we're totally supportive of. . . . Well, if they're going to make loans they should get a license to do loans, period." *Id.* at 225-26 (statement of Mr. Doyle).

Check cashers promptly began to engage in payday lending, almost mimicking Professor Caskey's testimony by claiming they simply were "cashing checks" in accordance with the Money Transmitters' Code. The Florida legislature subsequently passed the Deferred Presentment Act, §§ 560.401 to 408, Fla. Stat. (2002), to, among other things, "prevent fraud, abuse, and other unlawful activity associated with deferred presentment transactions." *Id.* at § 560.408.

While the Deferred Presentment Act is a recent enactment, Florida has long recognized the role usury laws play to protect borrowers from unfair lending practices. Seventy years ago the Florida Supreme Court noted: "The very purpose of statutes prohibiting usury is to bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans." *Chandler v. Kendrick*, 146 So. 551, 552 (Fla. 1933). *See also Jersey Palm-Gross, Inc. v. Paper*, 658 So. 2d 531, 534 (Fla. 1995) ("The Florida Legislature enacted Chapter 687, Florida Statutes (1993), to protect borrowers from paying unfair and excessive interest to overreaching creditors."); *Stubblefield v. Dunlap*, 4 So. 2d 519, 521 (Fla. 1941) ("it is entirely proper for us to bear in mind not only the letter but the spirit of the usury law and its prime purpose to protect needy borrowers by penalizing unconscionable money lenders.").

Inequalities between lenders and borrowers are more pronounced in the fringe banking sector than in the mainstream

consumer credit marketplace, and consumers who resort to these products are among those with the greatest need for a marketplace that operates with integrity and the enforcement of laws state legislatures intended for their protection. Fringe bankers should not be allowed to enforce illegal contracts by evading usury limits enacted to protect necessitous consumers from exploitative practices.

CONCLUSION

Amicus curiae AARP respectfully urges the Court to affirm the Florida Supreme Court's ruling that a court must determine whether a contract containing an arbitration clause is illegal and void under state law.

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